

THE WHITE HOUSE

WASHINGTON

January 7, 1976

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C. [signature]

MEMORANDUM FOR

BOB ELLSWORTH

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NINO SCALIA

JIM WILDEROTTER

STATINTL

STATINTL

FROM:

MIKE DUVAL 

SUBJECT:

PROPOSED BILL ESTABLISHING A
SENATE INTELLIGENCE COMMITTEE

The Senate Select Committee staff has forwarded a draft of a proposed bill on establishment of a Senate Intelligence Committee. I am planning to give them a paper with unofficial comments on their bill. Enclosed are copies of both documents. If you have any comments, please get them to me by Friday morning.

The Senate draft bill was given to us in confidence. It is essential that we maintain its confidentiality.

cc: Phil Buchen
Jack Marsh

D R A F T

7 Jan 76

COMMENTS ON BILL
ESTABLISHING A SENATE
INTELLIGENCE COMMITTEE

Senate Provision:

SEC. 2. It shall be the purpose of the Senate Committee on Intelligence Activities to oversee the intelligence activities and programs of the United States Government. In carrying out this purpose, the Committee shall make every effort to assure that the appropriate agencies and departments of the United States provide informed and timely intelligence necessary for the Executive and Legislative Branches to protect the security of the Nation. It shall also be the purpose of the Committee to maintain vigilant oversight over the intelligence activities of the United States to assure that such activities are consistent with the Constitution and laws of the United States.

(Emphases added)

Comment: The terms "oversee" and "maintain vigilant oversight over" represent a significant departure from the usual charters of Congressional committees. They imply a closer supervision of Executive Branch activities than seems appropriate under our Constitutional system.

Suggested Provision: Substitute "make continuing studies of" for "oversee" and "remain generally informed about" for "maintain vigilant oversight over."

Senate Provision:

SEC. 3. Sections 4 through 12 of this Act are enacted --

(1) as an exercise of the rulemaking power of the Senate, and as such they shall be considered as part of the rules of the Senate, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) With full recognition of the Constitutional right of the Senate to change such rules at any time, in the same manner, and to the same extent as in the case of any other rule of the Senate.

Comment: This provision breaks the legislation into two parts: (a) a statute (presumably Sections 2 and 13-17) and (b) a Senate resolution. The strategy seems designed to require the President to "sign" or "veto" the document as a whole. Since some of the most objectionable provisions are in those sections specified as "an exercise of a rule-making power of the Senate," the constitutionality of a "veto" based on objections to those sections could presumably be challenged. On the other hand, the President's signature on a one-House resolution seems Constitutionally inappropriate. A signature based on acceptability of the "statute" sections only would inevitably be taken as approval of (or at least acquiescence in) the "Senate Resolution" sections as well.

Suggested Provision: The difficulties referred to above could be avoided by dividing the legislation into a resolution and a statute. Such a division would avoid the problem for the President of having to determine whether or not to accept Section 11, which gives the Senate declassification authority, and other objectionable sections.

Senate Provision:

Sec. 6(a)(4):

Such committee shall have the duty to maintain oversight over all the intelligence activities of the Government. Such committee shall also have the duty to study and investigate all matters within its jurisdiction and consider and recommend to the Senate proposals for the improvement and reorganization of the intelligence operations of the Government to the extent that such proposals for improvement and reorganization of any such operation relate to a matter within the jurisdiction of such committee. (Emphasis added.)

Comment : For the same reason that the language of Section 2 required change (i. e., to prevent excessively close Congressional supervision of Executive activities), the term "maintain oversight over" requires modification.

Suggested Provision: Substitute "remain generally informed about" for "maintain oversight over."

Senate Provision: SEC. 8. (a) The Committee on Intelligence Activities of the Senate shall formulate and carry out such rules and procedures as it may deem necessary to prevent any disclosure outside such committee, not authorized by such committee, of any information in the possession of or obtained by such committee relating to the activities of the Central Intelligence Agency or any other department or agency of the United States engaged in intelligence activities.

Comment : The information covered by this provision would not encompass all sensitive information likely to be held by the Committee. Much substantive intelligence would not "relate" to the activities of the intelligence agencies.

Suggested Provision: SEC. 8. (a) The Committee on Intelligence Activities of the Senate shall formulate and carry out such rules and procedures as it may deem necessary to prevent any disclosure outside such committee, not authorized by such committee of any classified, or otherwise sensitive, information in the possession of or obtained by such committee.

Senate Provision: SEC. 8(b) Upon expiration of the Select Committee on Governmental Operations With Respect to Intelligence Activities, the records and files of the Committee shall become the property of the Committee on Intelligence Activities.

Comment: This section appears to run counter to long-standing agreements with the Senate Select Committee providing for return of some documents to the Executive Branch and transfer of the remaining documents to the Archives. Future access to the documents by third parties might well be more restricted if they were given to the new committee than it would be at the Archives.

Suggested Provision : (Add to the end of the Senate provision;) except for such records which were provided by the Executive Branch under an agreement providing that they would be returned upon the conclusion of the Committee's work.

Senate Provision: SEC. 9. (b) No employee of the Committee or any person engaged by contract or otherwise to perform services for the Committee shall be given access to any classified information by the Committee unless such employee or person has received an appropriate security clearance as determined by the Committee. The type of security clearance to be required in the case of any such employee or person shall, within the determination of the Committee, be commensurate with the sensitivity of the classified information to which such employee or person will be given access by the Committee.

Comment: This section provides that the Committee will make its own unilateral determinations of the security worthiness of its staff members. In the past, the Executive Branch has played a role in granting of security clearances to Congressional staff members. It seems appropriate for the DGI to have a role in such clearance decisions since most classified information to which the staff will have access relates to intelligence sources and methods. Furthermore, the process whereby committee staffers are cleared should also apply to GAO employees who are reviewing intelligence activities at the request of the committee pursuant to Section 15 of this bill.

Suggested Provision: SEC. 9 (b). No employee of the Committee or any person, including employees of the General Accounting Office, performing services for or at the request of the Committee shall be given access to any classified information unless such employee or person has received an appropriate security clearance as determined by the Committee in consultation with the Director of Central Intelligence. The type of security clearance to be required in the case of any such employee or person shall, within the determination of the Committee in consultation with the Director of Central Intelligence, be commensurate with the sensitivity of the classified information to which such employee or person will be given access by the Committee.

Senate Provision: SEC. 11. (a) The Committee may, after full and considered consultation with appropriate officials of the Executive Branch, disclose to the public any information received by it from the President or Vice President or any department or agency of the United States upon the Committee's determination that the public interest would be served by such disclosure. In any case in which such Committee decides to make public any information requested to be kept confidential, it shall notify the President to that effect. Such Committee may publicly disclose such information after the expiration of ten days following the day on which notice is transmitted to the President unless prior to the expiration of such ten-day period the President submits a written certification to such Committee stating that the public interest in such disclosure is clearly outweighed by the probability of grave harm to the national defense.

(b) If the President personally certifies pursuant to subsection 11(a) that, in his opinion, such information should not be publicly disclosed, and if after such certification is received by the Committee it remains the judgment of the Committee that such information should be disclosed, the Committee shall refer the matter to the Senate for such action as it deems appropriate.

(c) Any matter referred to the Senate by the Committee on Intelligence Activities pursuant to Section 11(b) shall become the pending business of the Senate. The time for debate shall be equally divided between the proponents and the opponents, and shall not exceed three calendar days. (Emphases added.)

Comment : In light of Section 13's extremely broad requirements for provision of information to the Committee, this section's authorization of the Senate to release any such information will cause extreme difficulty for intelligence agencies. The President will be unable to protect any information that a majority of the Senate wishes to release. It puts in statute for the first time a Congressional declassification authority.

Further, the standard of certification required of the President seems unduly high. He must certify that "public interest in such disclosure is clearly outweighed by the probability of grave harm to the national defense." Such a standard would rarely be applicable; it seems analagous to the very limited standard the Supreme Court has indicated its willingness to apply in prior restraint cases. Many disclosures might harm national interests without rising to the probability of grave harm. Many other disclosures would harm national security, but not necessarily be related to national defense. For instance, disclosure of our intelligence on Brazilian negotiating plans for an international coffee meeting would not cause grave harm to national interests nor would it relate to national defense. Yet, disclosure of such intelligence could be harmful to continued relations with that country and to American negotiating interests.

Suggested Provision: Four options exist:

(1) Delete any mention of a declassification procedure, leaving any future disagreements about making information public to ad hoc negotiation.

(2) Delete sections (b) and (c) and insert at the end of section (a):

If the President personally certifies that, in his opinion, such information should not be publicly disclosed, the Committee shall not disclose such information.

(3) Delete sections (b) and (c), and instead insert:

(b) If the President personally certifies pursuant to Section 11(a) that, in his opinion, such information should not be publicly disclosed, and, if after such certification is received by the Committee, it remains the judgment of the Committee that such information should be disclosed, the Committee shall seek judicial review to determine if the President can properly prevent disclosure.

(4) Retain the Senate's authority to declassify, but amend the certification standard in the last sentence of section (a) to read:

that the public interest in such disclosure is outweighed by the probability of harm to the national security.

Senate Provision: SEC. 13. (a) Notwithstanding Section 403(d) of the Title 50 USC or any other provision of law, it shall be the duty of the head of each department and agency of the United States to keep the Committee on Intelligence Activities of the Senate fully and currently informed with respect to all intelligence activities which in any respect are the responsibility of or are planned, supervised, financed or engaged in by such department or agency.

(b) Notwithstanding Section 403(d) of Title 50 USC or any other provision of law, it shall also be the duty of the head of any department or agency of the United States involved in intelligence activities to furnish any information requested by the Committee on Intelligence Activities of the Senate with respect to any matter within the Committee's jurisdiction.

(c) The Committee on Intelligence Operations of the Senate is authorized to specify any type or kind of intelligence activity which in its judgment is especially sensitive, and with respect to which such Committee is to have notice prior to executive decision to carry out any such activity, in order to assure that the advice of the Senate can be given in a timely fashion. No department or agency of the United States may engage in any type or kind of intelligence activity specified as especially sensitive by the Committee on Intelligence Operations of the Senate unless such Committee has been fully informed of the proposed activity by the head of the department or agency concerned prior to the time such activity is initiated.

Comment:

The references in (a) and (b) to Section 403(d) of Title 50 USC seems obscure. Presumably these references are intended to override the DCI's duty to protect intelligence sources and methods

in cases where he is providing information to the committee. Even if this provision is substantively wise, which is doubtful, the same result may be obtained through simplified drafting.

Subsection (a) would require intelligence agencies to keep the Committee fully and currently informed of all intelligence agencies. *actually*
This would seem to require the CIA to send copies of all memos and other documents in the Agency to the Committee. The requirement even extends to planned actions. It conceivably might require planned actions to be reported to the Committee prior to their approval by the President. As presently drafted, this requirement is unworkable and would be unproductive for the Committee. It injects Congress into day-to-day government operations to a greater degree than is appropriate under our Constitutional system.

Subsection (b) would require the agencies to furnish the Committee all information it requests. Such a blanket requirement would prevent the legitimate invocation of Executive Privilege, thereby raising substantial Constitutional questions.

Subsection (c) requires that the Committee be given prior notice (and be "fully informed") of any intelligence activity of a type which has been designated by the Committee as "especially sensitive." There are several problems with this subsection. First, to require prior notification of such activities would unduly limit Executive flexibility especially in emergency situations. Second, this provision gives no guidance on what types of activities may be designated "especially sensitive", thus making it impossible to predict its impact. Finally, the requirement that Congress be fully informed enables Congress always to claim it was not given enough prior information.

Amended

Suggested Provision: SEC. 13 (a) It shall be the duty of the head of each department and agency of the United States to keep the Committee on Intelligence Activities of the Senate informed with respect to intelligence activities conducted by such department or agency.

(b) It shall also be the duty of the head of any department or agency of the United States involved in intelligence activities to furnish information requested by the Committee on Intelligence Activities of the Senate with respect to any matter within the Committee's jurisdiction. This provision shall not infringe any Constitutional rights of the President which may exist to withhold information from the Congress.

Am (c) The Committee on Intelligence Operations of the Senate is authorized to specify any type or kind of intelligence activity which in its judgment is especially sensitive, and with respect to which such Committee is to have notice in a timely fashion. No department or agency of the United States may engage in any type or kind of intelligence activity specified as especially sensitive by the Committee on Intelligence Operations of the Senate unless such Committee is informed of the proposed activity by the head of the department or agency concerned on a timely basis.

Senate Provision: SEC. 14. No funds may be appropriated for any fiscal year beginning after September 30, 1976, to or for the use of any department or agency of the United States to carry out any activity referred to in clause (A) through (F) of this section unless such funds have been previously authorized to carry out such activity in such fiscal year (Emphasis added.)

Comment : This requirement for annual authorizations would cause many difficulties. It would greatly increase the secrecy problem by calling for annual Congressional legislative action on all intelligence activities. Some question exists as to whether it would be possible to conduct such an authorization process without revealing the size of intelligence budgets. Annual authorizations will also encourage legislative proposals, both from within the Committee and without, that would unduly interfere with agency activities. The Congressional desire

to maintain continuing scrutiny over the agencies would be better fulfilled through a more flexible authorization process. Some activities could be permanently authorized; most activities could be authorized for multi-year periods; and, if certain specific activities were of special concern, they could be authorized more frequently.

(Such is the pattern in the Defense Department.) Finally,

implementation of such a requirement for FY 1977 seems burdensome as Congress will begin considering that budget this month.

Suggested Provision: Change 1977 to 1978; and, delete the final phrase:

"In such fiscal year."

Senate Provision: SEC 16. As used in this Act -

(a) "National intelligence" means the collection, analysis, production, dissemination, and use of political, military and economic information affecting the relations of the United States with foreign governments, and other activity which is in support of, or supported by the collection, analysis, production, dissemination, and use of such information. National intelligence includes but is not limited to counterintelligence and clandestine activities.

(b) "Domestic intelligence" means the collection, analysis, production, dissemination, and use of information about other foreign intelligence services within the United States, its territories and possessions, and, information about those activities of persons within

the United States, its territories and possessions which is, or may be, deemed by any agency, bureau, office, division, instrumentality, or employee of the United States government to pose a threat to the internal security of the United States, and the activity which is in support of or supported by the collection, analysis, production, dissemination and use of such information. Domestic Intelligence includes but is not limited to counterintelligence and clandestine activities.

(c) "Intelligence activities" means the sphere of action and function of national intelligence and domestic intelligence.

Comment:

These definitions create many problems:

(1) The definition of national intelligence is all-inclusive. It would seem to sweep from complex reconnaissance systems to an intelligence officer assigned to an Army field unit. By sweeping so far, the definition would require, pursuant to Section 14(D), separate authorization of appropriations for activities in the Defense Department that are almost impossible to define and isolate. Some distinction between tactical intelligence and what is normally referred to as "national intelligence" is needed.

(2) The phrase "and the activity which is in support of or supported by..." sweeps into both definitions a wide variety of policy-making functions outside what is generally considered the

Intelligence Community. All negotiations are "supported by" intelligence, as are NSC meetings, preparation of Presidential summit talks, etc. Is the "supported by" phrase needed for any legitimate purpose?

(3) It is not clear why the distinction between "national" and "domestic" intelligence is necessary. The latter term is never used. The former term is used only one place, in Section 14(D), requiring prior authorizing legislation for appropriation of funds for DOD's "national intelligence activities." The intent of Section 14 (D) seems primarily to cover intelligence activities administered jointly by CIA and DOD.

(4) The communications security function of NSA does not seem to be included in the definition of "intelligence activities." Nevertheless, Section 14 requires that appropriations for all NSA activities be authorized annually,

(5) There seems no need to define the term "intelligence" explicitly. Disputes over the Committees' jurisdiction will have to be settled by a process of negotiation, which would not be facilitated by a general definition.

Suggested Provision

Delete Section 16. Amend Section 14(D) to read:

"Intelligence activities administered jointly by the
CIA and the Department of Defense."